APPENDICES

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION COMPANY, INC.,

Plaintiffs - Appellants,

v. **No. 4302**

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant-Appellee.

COURT OF APPEALS OF NEW MEXICO
FILED JUL - 1 1980
/s/ Susie M. Montoya Clerk

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY DONNELLY, Judge

MICHAEL P. GROSS
Santa Fe, New Mexico

RONALD J. VanAMBERG
SOLOMON, ROTH & VanAMBERG
Santa Fe, New Mexico Attorneys for Appellants

JEFF BINGAMAN, Attorney General
GERALD B. RICHARDSON, Assistant Attorney General, Taxation & Revenue Department
Santa Fe, New Mexico Attorneys for Appellee

OPINION

WOOD, Chief Judge

Lembke (Lembke Construction Company, Inc.) contracted with the School Board (Ramah Navajo School Board, Inc.) to build a school and related facilities on Indian land. The various contracts provided that Lembke was to pay New Mexico's gross receipts tax and Lembke has done so. Lembke and the School Board sued for a refund on these taxes. Section 7-1-26(A), N.M.S.A. 1978 (Repl. Pamph. 1979). Lembke has agreed to pay over to the School Board any rebate or recovery it might realize as a result of this suit for a refund. There is no issue as to proper parties. The trial court ruled in favor of the State, plaintiffs appeal. There are two issues: (1) the propriety of imposing the gross receipts tax and (2) the applicability of § 7-9-54, N.M.S.A. 1978.

Propriety of Imposing the Gross Receipts Tax

Lembke is in the business of general construction and contracting. Moneys received for this activity are "gross receipts" Section 7-9-3(F), N.M.S.A. 1978 (1979 Cum.Supp.). A tax is imposed on these gross receipts "[f]or the privilege of engaging in business . . . in New Mexico." Section 7-9-4, N.M.S.A. 1978 (1979 Cum.Supp.).

The School Board is a non-profit corporation, incorporated under New Mexico law. The School Board is entirely operated by members of the Ramah Navajo Chapter, which is a local unit of government of the Navajo Indian Tribe. For the limited purpose of entering contracts with or receiving grants from the Bureau of Indian Affairs, the School Board is a Navajo Tribal organization. 25 U.S.C. § 450b(c) (1979 Supp. Pamph.).

The Bureau of Indian Affairs contracted with the School

Board for actual construction of the school facilities; in turn, the School Board contracted with Lembke. All the construction money came from the federal government through specific congressional appropriations to the School Board.

There is no claim that New Mexico's gross receipts tax was directly imposed on the School Board; the tax was on the gross receipts of Lembke for the privilege of doing business. The contracts between the School Board and Lembke were cost-plus contracts. Pursuant to those contracts, the School Board paid Lembke an amount that included the tax and Lembke, in turn, paid the State. Thus the School Board has indirectly sustained the financial burden of the tax.

Lembke and the School Board challenge the imposition of the tax because the financial burden of the tax is on the School Board. We have held that the legal incidence of the gross receipts tax is upon one in the position of Lembke, *First Nat. Bank of Santa Fe v. Commissioner of Rev.*, 80 N.M. 699, 460 P.2d 64 (Ct.App. 1969); that a non-Indian, such as Lembke, is not exempt from state taxation because the receipts taxed were derived from activity on Indian land, *G. M. Shupe, Inc. v. Bureau of Revenue*, 89 N.M. 265, 550 P.2d 277 (Ct.App. 1976); *Tiffany Const. Co., Inc. v. Bureau of Revenue*, 93 N.M. 593, 603 P.2d 332 (Ct. App. 1979); that federal law did not preempt imposition of the tax, *Shupe, supra;* that the tax did not infringe on the right of reservation Indians to make their own laws and be governed by them, *Shupe, supra;* and that New Mexico's disclaimer to all rights and title to Indian lands did not bar imposition of the tax, *Shupe,supra.*

Lembke and the School Board suggest that we disregard New Mexico decisions, particularly the decision as to the in

cidence of the tax. Federal decisions have reached the same result as New Mexico. The legal incidence of the tax is on Lembke, the tax does not interfere with tribal self-government, the tax is not a tax on the Indian tribe or tribal property and federal laws do not preempt the tax. See *Mescalero Apache Tribe v. O'Cheskey,* 439 F.Supp. 1063 (D.N.M. 1977), aff'd by the 10th Circuit June 5, 1980 (Nos. 77-2102 and 77-2103).

Both federal decisions recognized the indirect burden of the tax was on the Indians but, nevertheless, sustained the New Mexico tax. In so doing, the 10th Circuit cited, with approval its decision in *United States v. State of N.M.,* 581 F.2d 803 (10th Cir. 1978) where there was a cost-plus contract, and where the indirect and ultimate burden of the tax was on the United States government. Here there is a cost-plus contract and the ultimate economic burden was on the School Board. The federal district court decision recognized that the indirect burden reduced the money that the Indians could spend, but held this burden was not prohibited by decisions of the United States Supreme Court nor preempted by federal legislation.

Lembke and the School Board would distinguish the federal decisions on the basis that school facilities are involved and that school facilities require a different result. They refer us to provisions in the treaty with the Navajos whereby the federal government was to provide schools and to congressional appropriations for these particular school facilities. Our answer, suggested by *Washington v. Confederated Tribes of the Colville Indian Reservation,* ____U.S.____ (No. 78-630 decided June 10, 1980), is that the appropriations for these specific school facilities do not

show an intent to prohibit New Mexico from taxing the gross receipts of the non-Indian contractor who builds the school.

Lembke and the School Board also contend that New Mexico may not impose its gross receipts tax upon Lembke's receipts absent specific federal legislation authorizing the tax. This contention is based on the view in McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973) that absent express authority from Congress, a state may not tax Indians or Indian property. The application of the gross receipts tax to Lembke does not require express authority from Congress because the tax is not on Indians or Indian property. The tax is on Lembke's gross receipts; the fact the indirect burden of the tax is on the Indian School Board is not a basis for holding that express authority from Congress is required for its imposition.

The trial court correctly ruled that the tax was applicable to Lembke's gross receipts.

Applicability of Section 7-9-54, supra

Section 7-9-54, supra, provides:

> Receipts from selling tangible personal property . . . to the governing body of an Indian tribe . . . for use on Indian reservations . . . may be deducted from gross receipts. That portion of the receipts from performing a service as defined in Subsection K of Section 7-9-3 NMSA 1978 which reflects the value of tangible personal property utilized or produced in performance of such service is not deductible.

Lembke and the School Board claim that Lembke was entitled to a deduction under § 7-9-54, supra, for Lembke's gross receipts based on the cost of materials and other tangi

ble property used in construction of the school facilities.

They contend that the School Board really purchased such items. Their theory is that when Lembke purchased such items, it purchased them as agent of the School Board. The trial court found that, under the contracts, Lembke was required to purchase and pay for such items; that Lembke purchased such items in its own name and paid for them; that Lembke had no authority to and did not pledge the credit of the School Board or the Navajo Tribe; that the School Board was never a disclosed purchaser of such items nor was the School Board billed for the items by the supplier and that title to such items, under the contracts, did not pass to the School Board until it paid Lembke. These findings are supported by substantial evidence; these findings support the conclusion that Lembke did not act as agent for the School Board in purchasing materials for the construction project. Contrast the federal district court decision in *Mescalero Apache Tribe v. O'Cheskey, supra.*

Lembke and the School Board contend that if Lembke did not purchase materials as agent for the School Board, then Lembke sold the materials to the School Board and, having sold the materials, Lembke performed no service and therefore there should have been a deduction for materials sold. This argument disregards the finding, supported by substantial evidence, that Lembke was not in the business of selling construction materials and only sells construction materials as part of a construction project in which the materials have been incorporated.

The applicable portion of § 7-9-3(K), supra, reads:

> "Service" includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project.

This statutory provision answers the claim that Lembke provided no "service". Inasmuch as the tangible materials included within the construction project were part of Lembke's service, the last sentence in § 7-9-54, supra, quoted above, applies and there was no deduction.

Lembke and the School Board also claim a deduction on the basis of another provision in § 7-9-3(K), supra. This provision states:

> [S]ales of tangible personal property that will become an ingredient or component part of a construction project *to persons engaged in the construction business* are sales of tangible personal property[.] (Our emphasis.)

The claim is that the School Board was engaged in the construction business and, therefore, was entitled to a deduction under § 7-9-54, supra.

The claim that the School Board was engaged in the construction business is spurious. The School Board's contract with the Bureau of Indian Affairs did name the School Board as the contractor; however, the School Board's contract with Lembke named Lembke as the contractor and the School Board as the owner. The School Board incorporated no tangible personal property into a construction project. The above-quoted provisions from § 7-9-3(K), supra, refer to persons engaged in construction, that is, building the building. Lembke built the building, the School Board did not.

The trial court properly denied a deduction under §

7-9-54, supra.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

/s/ Joe Wood
Chief Judge

WE CONCUR:

/s/ B. C. Hernandez

/s/ Leila Andrews

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION COMPANY, INC.,

Plaintiffs - Appellants,

v. No. 4302

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY DONNELLY, Judge

FILED
JUL - 11
1980
/s/ Susie M. Montoya
CLERK

MICHAEL P. GROSS
Santa Fe, New Mexico
RONALD J. VanAMBERG
SOLOMON, ROTH & VanAMBERG
Santa Fe, New Mexico Attorneys for Appellants

JEFF BINGAMAN, Attorney General
GERALD B. RICHARDSON, Assistant Attorney General, Taxation & Revenue Department
Santa Fe, New Mexico Attorneys for Apellee

ON MOTION FOR REHEARING

Lembke and the School Board moved for rehearing, contending that two recent decisions of the United States Supreme Court "effectively overrule the principal precedent relied upon by this Court in its decision, *Mescalero Apache Tribe v. O'Cheskey,* 439 F.Supp. 1063 (D.N.M. 1977), affirmed by the 10th Circuit June 5, 1980." We disagree.

White Mountain Apache Tribe v. Bracker, No. 78-1177, decided June 27, 1980, 48 U.S.L.W. 4897, involved the application of Arizona's motor carrier license tax and Arizona's use fuel tax to the activities of a non-Indian logging company operating solely on the reservation. *White Mountain* held that detailed and comprehensive federal regulation of the harvesting of Indian timber, and detailed regulation governing roads developed by the Bureau of Indian Affairs showed "that the federal regulatory scheme is so pervasive as to preclude" application of the two taxes. "There is no room for these taxes in the comprehensive federal regulatory scheme."

Central Machinery Company v. Arizona State Tax Commission, No. 78-1604, decided June 27, 1980, 48 U.S.L.W. 4904, involved the application of Arizona's transaction privilege tax to the sale of tractors to the Indian Tribe. *Central Machinery* held: "Since the transaction in the present case is governed by the Indian trader statutes, federal law pre-empts the asserted state tax."

Our case does not involve a comprehensive or pervasive scheme of federal regulation of the construction of a school nor does it involve federal regulation similar to the Indian trader statutes. Neither *White Mountain, supra,* nor *Central Machinery, supra,* overrule the *Mescalero Apache Tribe, supra,* decisions on which we rely.

We note that footnote 15 in *White Mountain* states:

"[T]he fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted . . . ." This supports our decision.

The motion for rehearing is denied.

/s/ Joe W. Wood
Chief Judge

/s/ B.C. Hernandez
Judge

/s/ Leila Andrews
Judge

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO
Thursday, August 14, 1980

No. 13,230

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION COMPANY, INC.,

Petitioners

vs. **Original Proceeding on Certiorari**

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Respondent.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari shall issue from this court as prayed for in the petition.

ATTEST: A TRUE COPY

/s/Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION COMPANY, INC.,

Petitioners **No. 13,230**

vs.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Respondent

WRIT OF CERTIORARI

THE STATE OF NEW MEXICO

TO: Court of Appeals
Santa Fe, New Mexico

GREETING:

WHEREAS, the Petitioners, through their attorneys, Michael P. Gross and Solomon, Roth & VanAmberg, Ronald J. VanAmberg, Santa Fe, New Mexico, did apply to this Court on July 29, 1980 for its review of the Decision handed down by the Court of Appeals on July 11, 1980 in Cause No. 4302 entitled The Ramah Navajo School Board, et al vs. Bureau of Revenue; and

WHEREAS, the Supreme Court gave notice to the Court of Appeals on July 29, 1980, in compliance with Rule 28(f) of the Rules of Appellate Procedure for Civil Cases, that an

application for writ of certiorari had been filed in the above entitled cause; and

WHEREAS, a copy of the application for writ of certiorari has been served on Respondent in the above entitled cause.

NOW, THEREFORE, the writ of certiorari is hereby issued and the Court of Appeals is hereby ordered to proceed no further in Cause No. 4302 pending the further Order of this Court.

WITNESS, The Honorable Dan Sosa, Jr., Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 14th day of August, 1980.

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO
Monday, March 30, 1981

No. 13,230

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION COMPANY, INC.,

Petitioners

vs. **Original Proceeding on Certiorari**

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Respondent

This matter having heretofore been submitted and taken under advisement, and a writ of certiorari having issued on August 14, 1980;

NOW, THEREFORE, IT IS ORDERED that the writ of certiorari heretofore issued in this cause on August 14, 1980, be and the same is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that the Record in Cause No. 4302 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST A TRUE COPY
/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX E

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No 4302

RAMAH NAVAJO SCHOOL BOARD, Apellants
INC., et al

SANTA FE County
BUREAU OF REVENUE Appellee **No. 78-438**

MANDATE
TO: DISTRICT COURT CLERK
(Applicable items are indicated by an "X" below.)

1. X — Attached is a true and correct copy of the original decision entered in the above-entitled cause.

2. X — This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision.

3. _____ — Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision now being final, this cause is remanded to you for any further proceeding consistent with said Supreme Court decision attached hereto.

4. _____ — You are directed to issue any commitment necessary for the execution of your judgment and sentence.

5. _____ — Cost Bill is assesed as follows:

6. _____ District Court Clerk's Record returned herewith.

7. X Exhibits filed herein shall be picked up at this Clerk's Office forthwith.

By direction of and in the name of the Chief Judge of the Court of Appeals, this 1st day of April, 1981.

(SEAL)
cc: Counsel

/s/ Susan W. Bagwell
Clerk of the Court of Appeals of the State of New Mexico

(Tear off and return this receipt)

No. 4302

RECEIPT IS ACKNOWLEDGED of the original mandate and Clerk's Record.

Dated: _____

_____
Clerk of the District Court

ATTEST: A true copy
Clerk of the Court of Appeals
of the State of New Mexico
/s/ Nancy C. Lopez Deputy

APPENDIX F

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO COUNTY OF SANTA FE

RAMAH NAVAJO SCHOOL BOARD, INC., and LEMBKE CONSTRUCTION CO., INC.,

Plaintiffs,

vs.

No. SF 78-438 (C)

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant.

DECISION OF THE COURT

The Court having heard the evidence and the testimony and the arguments of Counsel, and having considered the Requested Findings of Fact and Conclusions of Law, now renders the following decision:

FINDINGS OF FACT

1. The Plaintiff, Ramah Navajo School Board, Inc., is a non-profit corporation incorporated under the laws of the State of New Mexico, entirely operated by members of the Ramah Navajo Chapter, a local unit of government of the Navajo Indian Tribe, and which Ramah Navajo Chapter is located within the Ramah Navajo Indian Reservation in Valencia and McKinley counties, New Mexico.

2. The Plaintiff, Lembke Construction Co., Inc., is a New Mexico corporation, properly licensed by the State of New Mexico, and whose principal business is general construction and contracting.

3. The Defendant, Bureau of Revenue, State of New Mexico, is a governmental agency of the State of New Mexico, and is charged by law with the administration of the Tax Administration Act, and the assessment and collection of taxes, including taxes imposed under the Gross Receipts and Compensating Tax Act of the State of New Mexico.

4. The Plaintiff School Board's affairs are managed by a Board of Trustees elected by members of the Ramah Navajo Chapter and all members of said Ramah Navajo School Board, Inc. are enrolled members of the Navajo Indian Tribe.

5. The Plaintiff School Board corporation operates programs and projects primarily in the field of education for the benefit of the Ramah Navajo Indians located on the Ramah Navajo Reservation. The Ramah Navajo Reservation is situated approximately 35 miles southeast of Gallup, New Mexico, and occupies a territory of approximately 1,000 square miles and occupied by about 2,000 Navajos.

6. The Plaintiff School Board corporation is a Navajo Tribal organization within the meaning of 25 U.S.C., Sec. 440 b(c) for the limited purpose of entering into contracts with or receiving grants from the Bureau of Indian Affairs, but the said School Board is not part of or equivalent to the governing body of the Navajo Indian Tribe.

7. In 1973, the Bureau of Indian Affairs contracted with the Plaintiff School Board for the design of new school facilities, and in 1974, contracted with the School Board for actual construction of school facilities, pursuant to specific

congressional appropriations solicited by and made to the Ramah Navajo School Board.

8. All of the money with which the Plaintiff Ramah Navajo School Board facilities were constructed and continue to be constructed with, come from the federal government through spcific congressional appropriations to the School Board under P.L. 92-369, P.L. 93-120, P.L. 93-245, P.L. 93-404, P.L. 94-165, and P.L. 97-74. In order to obtain these appropriations, members of the Plaintiff School Board testified before congress on many occasions to justify their need for these monies. Navajo Tribal monies were not used to construct the new school facilities.

9. The Navajo Tribe, acting through its tribal council, has authorized and continues to authorize the Plaintiff School Board to contract with the Bureau of Indian Affairs, pursuant to P.L. 93-638, for monies to operate the Ramah Navajo School facilities.

10. The new educational facilities built for use by the Plaintiff School Board, are located exclusively on Navajo trust land leased to the School Board for educational uses and purposes. The contracts between the Bureau of Indian Affairs and the School Board designate the Ramah Navajo School Board as the design and building contractor. The initial contract for construction vests title to the educational facilities in the School Board.

11. The Plaintiff, Lembke Construction Company, Inc., is a non-Indian corporate entity, and it entered into a subcontract with the School Board to construct a school complex and related facilities in fulfillment of the School Board's obligations to the United States under its contracts with the Bureau of Indian Affairs.

12. The construction contracts between the Plaintiff, Lembke Construction Company, Inc., and the Plaintiff

School Board require that Lembke pay the New Mexico taxes required by law. Section 4.6.1 of the Standard Form of Agreement between owner and contractor and wherein the owner is Ramah Navajo School Board, Inc. and the contractor is Lembke Construction Company, Inc., provides:

> "4.6.1 The contractor shall pay all sales, consumer use and other similar taxes required by law."

13. Since entering into contracts to build facilities for Plaintiff School Board, Lembke Construction Company, Incorporated has been paying and continues to pay the New Mexico gross receipts tax to Defendant Bureau of Revenue on its receipts from the school construction project. Lembke's bids or cost estimates have always included, as a part of the cost to the Plaintiff School Board, the cost of the gross receipts tax.

14. At the inception of the building of school facilities for the Plaintiff School Board, there were two bidders for construction of the project, and both bidders included New Mexico gross receipts tax in their jobs.

15. Seciton 1 Y of the general requirements attached to the invitation for bids for the Ramah Navajo School Construction project informs bidders, including the Plaintiff, Lembke Construction, Company, Inc., that they must comply with the New Mexico "sales and use tax laws".

16. The Plaintiff School Board has no direct liability to the Bureau of Revenue for gross receipts taxes arising from the construction of the Ramah School facilities. However, pursuant to its agreement with Plaintiff Lembke Construction Company, Inc., the said contractor has passed on this tax to the School Board, which has thus indirectly sustained the financial burden of the tax.

17. The Defendant's exhibits F through N, attached to the affidavit of Jan Unna filed in support of Defendant's motion for Summary Judgment, represent typical subcontracts, materials contracts, invoices, non-taxable transaction certificates, and payments to materials suppliers and subcontractors of Lembke Construction project. These documents represent the typical manner in which materials were purchased, invoiced and paid for by Lembke on the Ramah School Construction project. The procedures reflected in these documents for the Ramah School project represent the standard practice of Lembke in handling these matters in other construction projects which occur off of any Indian reservation.

18. To date, Plaintiff Lembke Construction Company has paid the Bureau of Revenue the total sum of $232,264.38 on its gross receipts derived from the construction of educational facilities for the School Board, all of which payments have been reimbursed by the School Board from the federal funds allocated to this project under the congressional appropriations mentioned in Finding of Fact No. 8, *supra*.

19. The Plaintiffs have brought this action pursuant to Sec. 7-1-26 N.M.S.A., 1978 Comp. (formerly Sec. 72-13-40 N.M.S.A., 1953 Comp.) in order to claim a refund of gross receipts taxes paid by Lembke Construction Company, Inc., attributable to its receipts from construction contracts between the Plaintiff School Board and Plaintiff Lembke Construction Company, Inc., through the date of trial.

20. The Plaintiff, Lembke Construction Company, Inc., has agreed to pay the School Board any rebate or recovery it might realize as a result of this action.

School Board, expressly designate Lembke as an agent for any purpose.

22. The Plaintiff, Lembke Construction has exhausted its administrative remedies under the Tax Administration Act, however, the architects and engineers, West and Hirschen, Gammill, Trumbo and Cook, are not parties to the suit and have not exhausted their administrative remedies and there are no specific financial figures attributable to the gross receipts paid by them.

23. Education is one of the several functions of the Navajo Tribal government. Other typical functions of Navajo Tribal government include such areas as: Law Enforcement and Police Power; Road Construction, Repair and Maintenance; Economic Development; Housing; Resources Management; Health Care; and Social Welfare.

24. Approximately 450 Ramah Navajos attend the Pine Hill Schools, operated by the Plaintiff School Board for students in grades kindergarten through 12. Approximately 35 Ramah Navajos attend Zuni High School at Zuni, New Mexico. Zuni High School is part of the New Mexico public school system operated by the Gallup-McKinley County school system. The State of New Mexico Education Department provides bus service solely within McKinley County for those students from Ramah Village to Zuni High School and back.

25. In 1973, the Bureau of Indian Affairs contracted with the Plaintiff School Board for the design of new school facilities, and in 1974, contracted with the Plaintiff School Board for actual construction of the school facilities, pursuant to specific congressional financial appropriations solicited by and made to the Plaintiff School Board. The contracts between the Bureau of Indian Affairs and the School Board designate the Plaintiff School Board as the

design and building contractor for the purpose of getting the school facility built, however, the Plaintiff School Board did not do the actual construction work or design work on the project itself, and it contracted with the Plaintiff Lembke and two architectural firms, Hirschen, Gammill, Trumbo and Cook, and Architects-Engineers, West.

26. There is no allegation in the Plaintiffs' Amended Complaint that the Plaintiff School Board is engaged in the construction business or in the business of providing architectural services.

27. The Plaintiff, Lembke Construction Company, Inc., had done all the actual construction work on the Plaintiff's school facilities pursuant to contracts between the two plaintiffs.

28. The Plaintiff School Board has no direct liability to the State of New Mexico, Bureau of Revenue, for any payment of gross receipts taxes arising from the construction of the Plaintiff's school facilities.

29. The Plaintiff, Lembke Construction Company, Inc., does derive gross receipts from its contract with the Plaintiff School Board for the construction of the school, and has self-assessed gross receipts taxes throughout the course of the construction project. Under its contracts with the Plaintiff School Board, the Plaintiff Lembke has passed on the cost of the gross receipts tax that it pays to the Bureau of Revenue to the Plaintiff School Board as a cost of the project for which the School Board reimburses Lembke.

30. The Plaintiff Lembke Construction Company, Inc., is required to purchase and pay for all materials necessary for the school construcion project.

31. In purchasing the materials for the school project, the Plaintiff, Lembke Construction Company, Inc., purchased the materials in its own name and was billed for

those materials in its own name.

32. In none of the contracts between the Plaintiff, Lembke and the Plaintiff School Board, Lembke was not given any written or implied authority to pledge the credit of the School Board or the Navajo Tribe.

33. In purchasing materials for the Plaintiff School Board's construction projects, Lembke did not pledge the credit of the School Board or the Navajo Tribe.

34. The Plaintiff School Board was never a disclosed purchaser of materials for the Ramah School Construction project, nor was the School Board billed for materials incorporated in the Ramah School Construction project.

35. As specified in the terms of the contracts between the Plaintiff, Lembke Construction Company, Inc., and the Plaintiff School Board, title to the materials used in the school construcion project does not pass to the school board until the Plaintiff Lembke receives payments for those materials in the form of a progress payment from the School Board.

36. The written contracts entered into between the Plaintiffs provide in their terms that Lembke Construction Company, Inc. makes a profit on the materials which it incorporates into the school construction project.

37. The Plaintiff Lembke Construction Company, Inc., is not in the business of selling construction materials at retail and it only sells construction materials as part of a construction project in which the materials are incorporated.

38. In the contracts between the Bureau of Indian Affairs and the School Board, there is no language designating the School Board as an agent of the Bureau of Indian Affairs for any purposes.

39. To date, Lembke Construction Company has paid

the Bureau of Revenue the total sum of $232,364.38 on its gross receipts derived from the construction of educational facilities for the School Board, all of which payments have been reimbursed by the School Board to Lembke. There is no specific dollar amount attributable to gross receipts taxes paid by Lembke on the sale of construction materials for the Ramah School project to the School Board.

40. P.L. 93-638 contemplates State participation in Indian education.

41. Title 10 of the Navajo Tribal Code contemplates State participation in Indian education.

42. The Ramah Navajo School Board has been operating schools for the benefit of Ramah Indians since 1970.

43. Since 1975 the School Board has been providing education to Ramah Navajo Indians in its own school facilities. It has continued to educate Ramah Indian students even though it has reimbursed Lembke for the gross receipts taxes Lembke paid the Bureau of Revenue on its receipts from the Ramah School project.

44. There is no language in the congressional appropriations of money to the Ramah Navajo School Board prohibiting the imposition of State taxes on the construction activities to build the Ramah School facilities.

45. The gross receipts tax which Lembke Construction Company has been paying is imposed on Lembke Construction Company and not upon Indians, tribal organizations or Indian lands. The activities of Lembke which are being taxed are its construction activities. Educational activities by the School Board are not being taxed by the New Mexico gross receipts tax.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties hereto and the subject matter hereof.

2. The Plaintiffs, Lembke Construction Company, Inc., and Ramah Navajo School Board, Inc., have sought a refund of gross receipts taxes both for themselves and for Hirschen, Gammill, Trumbo and Cook, and West, Architects-Engineers.

3. The legal incidence of New Mexico's gross receipts tax is on the seller of goods and services and not upon the purchaser.

4. The Plaintiff, Lembke Construction Company, Inc., is taxable under the New Mexico gross receipts tax and the monies it seeks to have refunded to it in this case as gross receipts were derived from selling construction services within New Mexico.

5. The gross receipts paid by the Plaintiff, Lembke Construction Company, Inc., as a non-Indian construction contractor from construction work performed on the Navajo Indian reservation and located in New Mexico, are fully taxable under the New Mexico Gross Receipts and Compensation Tax Act.

6. The Plaintiff School Board, as a purchaser of goods and services from Lembke Construction Company, Inc. is not itself taxable under the provisions of the New Mexico gross receipts tax even though the economic burden of the gross receipts tax may be passed on to the purchaser by the seller.

7. The imposition of the New Mexico gross receipts tax on Lembke Construction Company, Inc. does not constitute an unlawful interference with the right of the Plaintiff School Board to operate its school facilities, or the right of

the Navajo Indians to make their own laws and be governed by them.

8. The imposition of the New Mexico gross receipts tax on the receipts of the Plaintiff, Lembke Construction Company, Inc. for performing construction services for the Plaintiff School Board on the Navajo reservation within the State of New Mexico, is not prohibited by reason of the supremacy clause of the United States Constitution and the doctrine of preemption.

9. Imposition of New Mexico's gross receipts tax upon the receipts of the Plaintiff, Lembke, derived from construction activities performed on the Navajo Indian Reservation and within the State of New Mexico is not prohibited by the New Mexico constitutional disclaimer of jurisdiction over Indians in Indian lands, contained in Article XXI, Sec. 2, New Mexico constitution.

10. The Plaintiff, Lembke Construction Company, Inc., did not act as agent for the Ramah Navajo School Board when it purchased materials for the Ramah School Construction project.

11. The Plaintiff, Ramah Navajo School Board, Inc. did not act as purchasing agent for materials for the said School Construction project for either the Navajo Tribe or the United States of America.

12. The Plaintiff School Board was not engaged in the construction business in the building of the school project and it is not entitled to any exemption from the tax laws of New Mexico or which would warrant any refund of the gross receipts tax paid by Plaintiff, Lembke Construction Company, Inc.

13. The Plaintiff, Lembke Construction Company, Inc., is not entitled to claim the deduction specified in Sec. 7-9-54 N.M.S.A., 1978, for its gross receipts derived from

the Ramah School construction project attributable to construction materials incorporated in the Ramah School project.

14. The claim for refund by the Plaintiff for Hirschen, Gammill, Trumbo and Cook, and Architects-Engineers West, is not properly before the Court and said parties have not exhausted their administrative remedies and said claim should be dismissed.

15. The Plaintiffs, Ramah Navajo School Board, Inc. and Lembke Construction Company, Inc., have properly exhausted their administrative remedies as a prerequisite to the bringing of this action.

16. The claims of the Plaintiffs and each of them against the Defendant should be denied, and the Defendant, Bureau of Revenue, is entitled to judgment dismissing Plaintiff's Complaint.

Each of the Findings of Fact and Conclusions of Law, submitted by the parties hereto, which are not expressly adopted herein by the Court or which are inconsistent herewith, are denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Thomas A. Donnelly
District Judge

CERTIFICATION
I HEREBY CERTIFY THAT A COPY OF
THE FOREGOING DECISION WAS MAILED
TO COUNSEL OF RECORD ON THE 27th
DAY OF AUGUST 1979
/s/ Helen M. Rael

APPENDIX G

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

RAMAH NAVAJO SCHOOL BOARD, INC., and LEMBKE CONSTRUCTION CO., INC.,

Plaintiffs,

vs. **No. SF 78-438 (C)**

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant.

JUDGMENT

This action came on for trial before the Court, the Honorable Thomas A. Donnelly, District Judge, presiding, the Court having heard the testimony and the evidence presented by the parties and the issues having been duly tried, Findings of Fact and Conclusions of Law having been entered in which the issues were found in favor of Defendant Bureau of Revenue, and against Plaintiffs Ramah Navajo School Board, Inc., and Lembke Construction Company, Inc., and a decision having been duly rendered,

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiffs take nothing against Defendant, that the action be dismissed on the merits, and that each party shall bear his own costs.

/s/ Thomas A. Donnelly
District Judge

Approved as to form
/s/ Michael P. Gross
Attorney for Plaintiffs

/s/ Ronald J. VanAmberg
Attorney for Plaintiffs

/s/ Gerald B. Richardson
Attorney for Plaintiffs

CERTIFICATION
I HEREBY CERTIFY THAT A COPY OF
THE FOREGOING JUDGEMENT WAS MAILED
TO COUNSEL OF RECORD ON THE 6th
DAY OF SEPTEMBER 1979
/s/ Helen M. Rael

APPENDIX H

State of New Mexico
BUREAU OF REVENUE
SANTA FE, NEW MEXICO
87503

AN EQUAL OPPORTUNITY EMPLOYER

Michael P. Gross, Esq.
Post Office Box 1447
40 Sena Plaza
Santa Fe, New Mexico 87501

FEB 07 '78

Lembke Construction Co., Inc.
Claim for Refund

Dear Mr. Gross:

As you of course know, we have received Lembke Construction Company's claim for refund and the informal discussion paper which you submitted at the time of the informal conference on January 6, 1978. We have also reviewed copies of Lembke's construction contracts submitted subsequent to the informal conference.

After consideration of the facts and arguments you have presented, Lembke Construction Co's claim for refund is denied. The gross receipts of a non-Indian contractor, such as Lembke, from performing construction services on a reservation in New Mexico is taxable. *Mescalero Apache Tribe v. O'Cheskey,* Case No. 76-171B D.N.M. Memorandum opinion October 19, 1977, on appeal Tenth Circuit

Court of Appeals No. 77-2103. See also *Prince v. Board of Education*, 88 N.M. 548, 543 P.2d 1176 (1976). If Lembke Construction Co. should decide to pursue its administration remedy pursuant to §72-13-38, N.M.S.A. 1963, Ramah Navajo School Board, Inc.'s motion to intervene will then be considered. There is no need to rule on that motion at this time.

Very truly yours,
/s/ Arthur Snead
Deputy Commissioner

AS/JU/ca

APPENDIX I

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC.
and LEMBKE CONSTRUCTION CO., INC.,

Plaintiffs-Appellants

vs. No. 4302

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ramah Navajo School Board, Inc., and Lembke Construction Co., Inc., Plaintiffs-Appellants in the above-style cause, appeal to the Supreme Court of the United States from the order of the Court of Appeals of the State of New Mexico entered July 1, 1980, affirming the judgment dismissing the action on the merits, petition for rehearing denied by the Court of Appeals of the State of New Mexico July 14, 1980; the Supreme Court of the State of New Mexico having quashed its previously granted writ of certiorari to the Court of Appeals of the State of New Mexico in this matter March 30, 1981.

The appeal is taken pursuant to 28 U.S.C. §1257(2).

ROTH, VANAMBERG AND

MAY 11 1981

GROSS
BY:/s/ Michael P. Gross
Michael P. Gross
P.O. Box 1447
40 Sena Plaza
Santa Fe, New Mexico 87501
(505) 988-8979
Counsel for Appellants

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on May 11, 1981, I served true copies of the above appeal upon all counsel of record by depositing one (1) copy each in the United States Mail, first class postage prepaid, addressed to:

Mr. Gerald B. Richardson
Office of the Attorney General
P.O. Box 630
Santa Fe, New Mexico 87509

Mr. Jan Unna
Rothstein, Bailey and Unna
136 Grant Avenue
Santa Fe, New Mexico 87501

/s/ Michael P. Gross
Michael P. Gross

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION CO., INC.,

Plaintiffs-Appellants

vs. **No. 4302**

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant-Appellee.

AMENDED CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on May 11, 1981, I filed and served a notice of Appeal to the Supreme Court of the United States in the above-matter upon all parties required to be served by depositing true copies thereof in the United States Mail, first class postage prepaid, addressed to:

Mr. Gerald B. Richardson
Office of the Attorney General
P.O. Box 630
Santa Fe, New Mexico 87509

Mr. Jan B. Unna
Rothstein, Bailey and Unna
136 Grant Avenue
Santa Fe, New Mexico 87501

/s/ Michael P. Gross
ROTH, VANAMBERG &
GROSS
P.O. Box 1447
40 Sena Plaza
Santa Fe, New Mexico 87501
(505) 988-8979
Counsel for Appellants
and local counsel for the
Amicus Curiae, Navajo Nation

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on May 14, 1981, I served the above amended certificate of service upon all parties required to be served by depositing true copies thereof in the United States Mail, first class postage prepaid, addressed to:

Mr. Gerald B. Richardson
Office of the Attorney General
P.O. Box 630
Santa Fe, New Mexico 87509

Mr. Jan Unna
Rothstein, Bailey and Unna
136 Grant Avenue
Santa Fe, New Mexico 87501

/s/ Michael P. Gross
Michael P. Gross

APPENDIX J

LAW OFFICES
ROTH, VAN AMBERG & GROSS
SUITE 40, SENA PLAZA
POST OFFICE BOX 1447
SANTA FE, NEW MEXICO 87501
505/983-7319 - 988-8979

May 22, 1981

Mrs. Susan W, Bagwell
Clerk,
Court of Appeals
State of New Mexico
P.O. Box 2008
Santa Fe, New Mexico 87501

Re: *Ramah Navajo School Board, Inc., et. al. v. Bureau of Revenue*
Court of Appeals No. 4302

Dear Mrs. Bagwell:

Enclosed for filing please find an Amended Notice of Appeal and Proof of Service to the United States Supreme Court in the above-styled matter.

Also enclosed for filing is a copy of Appellants' Notice of Appeal to the Supreme Court of the United States filed in the Supreme Court of the State of New Mexico May 11, 1981.

I understand the Court of Appeals is possessed of the record in this case except for exhibits which you previously directed

be picked up by counsel. Counsel have agreed to safeguard the exhibits pending this appeal.

I appreciate your cooperation.

Sincerely,
/s/ Michael P. Gross
MICHAEL P. GROSS

cc: Gerald B. Richardson, Esq.
Jan B. Unna, Esq.

COURT OF APPEALS
FILED
MAY 22 1981

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION CO., INC.,

Plaintiffs-Appellants

vs. **No. 4302**

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Defendant-Appellee.

AMENDED NOTICE OF APPEAL AND PROOF OF SERVICE

Please take notice that the Ramah Navajo School Board, Inc., and Lembke Construction Co., Inc., Planitiffs-Appellants in the above-styled cause, appeal to the Supreme Court of the United States from the order of the Court of Appeals of the State of New Mexico entered July 1, 1980, affirming the judgment of the District Court, First Judicial District, County of Santa Fe, State of New Mexico. dismissing this action on the merits, the Court of Appeals having denied Plaintiffs-Appellants' petition for rehearing July 11, 1980, and the Court of Appeals of the State of New Mexico having issued its mandate marking its decision as final on April 1, 1981 (following the quashing of a Writ of Certiorari to the Court of Apeals by the Supreme Court of the State of New Mexico March 30, 1981).

The appeal is taken pursuant to 28 U.S.C. §1257(2).

ROTH, VANAMBERG AND GROSS
BY:/s/ Michael P. Gross
Michael P. Gross
P.O. Box 1447
40 Sena Plaza
Santa Fe, New Mexico 87501
(505) 988-8979

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on May 22, 1981, I filed and served the above Ameded Notice of Appeal and Proof of Service in the above styled matter upon all parties required to be served by depositing true copies thereof in the United States Mail, first class postage prepaid, addressed to:

Mr. Gerald B. Richardson
Office of the Attorney General
P.O. Box 630
Santa Fe, New Mexico 87509

Mr. Jan Unna
Rothstein, Bailey and Unna
136 Grant Avenue
Santa Fe, New Mexico 87501

and that I filed a true copy of the above Ameded Notice of Appeal and Proof of Service in the District Court, First Judicial District, County of Santa Fe, State of New Mexico, on the same date.

/s/ Michael P. Gross
Michael P. Gross

COURT OF APPEALS

FILED
MAY 22 1981

ORIGINAL PLEADING
FILED ON 5-22-81
SF COUNTY
DISTRICT COURT CLERK'S OFFICE

APPENDIX K

NEW MEXICO TAX STATUTES

7-9-4. Imposition and rate of tax; denomination as "gross receipts tax."

A. For the privilege of engaging in business, an excise tax equal to three and three-fourths percent of gross receipts is imposed on any person engaging in business in New Mexico.

7-9-5. Presumption of taxability.

To prevent evasion of the gross receipts tax and to aid in its administration, it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax. Any person engaged solely in transactions specifically exempt under the provisions of the Gross Receipts and Compensating Tax Act shall not be required to register or file a return under this act.

7-19-8. Collection by bureau; distribution of proceeds; deductions.

A. The bureau [revenue division of the taxation and revenue department] shall collect the municipal gross receipts tax in the same manner and at the same time it collects the state gross receipts tax.

APPENDIX L

INDIAN SELF—DETERMINATION AND EDUCATION ASSISTANCE ACT OF 1975, PUBLIC LAW 93-638 88 STAT. 2203, 25 U.S.C. §§450 et. seq. (EXCERPTS)

INDIAN SELF-DETERMINATION [NEW]

§ 450. Congressional statement of findings

(a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that——

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that——

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

§ 450a. Congressional declaration of policy

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

§§ 450b. INDIANS

(c) "Tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum partipation of Indians in all phases of its activities: *Provided,* That in any case where a contract is let or grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant;

§ 450f. Contracts by Secretary of the Interior with tribal organizations— —Request by tribe for contract by Secretary to plan, conduct and administer education, etc., programs; refusal of request

(2) The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in the Act of April 16, 1934, as amended by this Act, any other program or portion thereof-which the Secretary of the Interior is authorized to administer for the benefit of Indians under the Act of November 2, 1921, and any Act subsequent thereto . . .

§ 450n. Sovereign immunity and trusteeship rights unaffected

Nothing in this Act shall be construed as— —

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit

enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

§ 458. School construction, acquisition, or renovation contracts——Authorization; prerequisites

(a) The Secretary is authorized to enter into a contract or contracts with any State education agency or school district for the purpose of assisting such agency or district in the acquisition of sites for, or the construction, acquisition, or renovation of facilities (including all necessary equipment) in school districts on or adjacent to or in close proximity to any Indian reservation or other lands held in trust by the United States for Indians, if such facilities are necessary for the education of Indians residing on any such reservation or lands.

Eligibility of private schools to receive funds; maximum amount

(c) The Secretary may expend not more than 25 per centum of such funds as may be authorized and appropriated pursuant to this section on any school eligible to receive funds under section 458d of this title.

§ 458d. Same; elegibility for funds of tribe or tribal organization controlling or managing private schools; report to Congressional Committees

The Secretary is authorized and directed to provide funds, pursuant to this Act; the Act of April 16, 1934; or any other authority granted to him to any tribe or tribal

organization which controls and manages any previously private school. The Secretary shall transmit annually to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives a report on the educational assistance program conducted pursuant to this section.

Pub.L. 93-638, Title II, § 208, Jan. 4, 1975, 88 Stat. 2216.

APPENDIX M

New Mexico Disclaimer of Jurisdiction over Indian Lands, Enabling Act, Sec. 2(B), 36 Stat. 558-559, N.M. Const., Art. XXI, sec. 2.

Sec. 2. Meeting of delegates; mandatory provisions of constitution.

The delegates to the convention thus elected shall meet in the hall of the house of representatives in the capital of the territory of New Mexico at twelve o'clock noon on the fourth Monday after their election, and they shall receive compensation for the period they actually are in session, but not for more than sixty days in all. After organization they shall declare on behalf of the people of said proposed state that they adopt the constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed state, all in the name and under the conditions contained in this act. The constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the constitution of the United States and the principles of the Declaration of Independence.

And said convention shall provide, by an ordinance irrevocable without the consent the United States and the people of said state:

B. that the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty;

and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; and that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress; but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe;

APPENDIX N

THE SNYDER ACT, 25 U.S.C. SEC. 13, NOV. 2, 1921, C. 115, 42 STAT. 208. EXPENDITURE OF APPROPRIATIONS BY BUREAU OF INDIAN AFFAIRS

The Bureau of Indian Affairs under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

General support and civilization, including education. . . . .

APPENDIX O

INDIAN SELF-DETERMINATION ACT REGULATIONS, 25 C.F.R. PART 271 AND PART 274

RULES AND REGULATIONS
SUBPART A——GENERAL PROVISIONS
(EXCERPTS)

§ 271.1 Purpose and scope.

(a) The purpose of the regulations in this Part is to give the application and approval process for non-profit contracts with the Bureau under section 102 of Title I of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, 88 Stat. 2203). Title I is known as the Indian Self-Determination Act. Contracts under the Act include "tribal governmental functions" as defined in § 271.2(q), "business related functions" as defined in § 271.2(d), and certain contractable trust resources programs or parts of programs as set forth in § 271.32. The nature of contracts with Indian entities which do not fall within the purview of the Act, including contracts which may provide for profit, and the conditions for entering into such contracts, are set forth in the regulations implementing the Act of June 25, 1910 (36 Stat. 861, 25 U.S.C. 47), commonly referred to as the "Buy Indian" Act.

(b) Section 104 of Title I of the Act provides authority for making grants for certain purposes. It is the Bureau's policy to make grants for the purposes specified in Section 104 of the Act in lieu of contracts, Part 272 of this chapter gives the procedures and requirements for obtaining grants under section 104 of the Act.

(c) Nothing in these regulations shall be construed as:

(1) Affecting, modifying, diminishing, or otherwise im-

pairing the sovereign immunity from suit enjoyed by an Indian tribe;

(2) Authorizing or requiring the termination of any trust responsibility of the United States with respect to the Indian people; or

(3) Permitting significant reduction in services to Indian people as a result of this Part.

(d) Nothing in these regulations shall be construed to mandate a tribe to apply for a contract or contracts with the Bureau to plan, conduct, and administer all or parts of any Bureau program. Such applications under these regulations are strictly voluntary.

§ 271.2 Definitions

(i) "Indian" means a person who is a member of an Indian tribe.

(j) "Previously private school" means a school (other than a Federal school formerly operated by the Bureau) that is operated primarily for Indian students in any grade or grades from age 3 years through grade(s) 12; and, which at the time of application is controlled, and sanctioned or chartered by the governing body(s) of an Indian tribe(s).

(n) "Superintendent" means the official in charge of a Bureau of Indian Affairs agency office except that:

(2) The term means the Chief, Division of Facilities Engineering, for matters regarding contracting for all or part of the construction, building, and utilities program which is contractable under this part and which is within the responsibility of the Division of Facilities Engineering.

(p) "Tribal government, "tribal governing body" and "tribal council" means the recognized governing body of an Indian tribe.

(q) "Tribal governmental function" means all programs authorized to be administered by the Bureau for the benefit of Indians enumerated as line items in the Bureau's annual budget requests under the Activities of Education and Indian Services, the Subactivities of Direct Employment and Road Maintenance, and those programs related to Irrigation and Power Operation and Maintenance identified as a part of the subactivity minerals, mining, irrigation and power under the Activity of Tribal Resources Development.

(r) "Tribal organization" means the recognized governing body of any indian tribe; or any legally established organization of Indians or tribes which is controlled, sanctioned, or chartered by such governing body or bodies or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; *Provided,* That a request for a contract must be made by the tribe that will receive services under the contract; *Provided further,* That in any case where a contract is let to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting of such contract.

§ 271.4 Statement of policy.

(a) The Congress has recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress has declared its commitment to the

maintenance of the Federal Government's unique and continuing relationship with and responsibilities to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

PART 274——SCHOOL CONSTRUCTION CONTRACTS OR SERVICES FOR TRIBALLY OPERATED PREVIOUSLY PRIVATE SCHOOLS

SUBPART A——GENERAL PROVISIONS

§ 274.1 Purpose

The purpose of the regulations in this Part is to give the application and approval process for obtaining a contract or services from the Bureau for school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations under secions 204 and 208 of Title II of the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638. 88 Stat. 2203).

§ 274.2 Scope.

The Act authorizes the expenditure of funds authorized and appropriated under Part B of the Act to contract or provide for tribally operated previously private schools. After an application has been completed and approved by the tribe, the application is forwarded through Bureau channels to the Commissioner for ranking by priority. If a project is within the funding priority, the Bureau contracting officer offers to negotiate a contract with the applicant subject to approval by the requesting tribe(s) for planning,

architectural-engineering design, facilities, construction, and purchase of equipment to provide educational facilities meeting Bureau space standards and construction code regulations. Subject to approval by the requesting tribe(s), the applicant then has the following options:

(a) Enter into a contract with the Bureau under which the applicant performs all or part of the necessary work with the Bureau performing the rest.

(b) Request that the Bureau perform or arrange for the performance of all the necessary work.

[40FR 51303, Nov. 4, 1975, as amended at 43 FR 37445, Aug. 23, 1978]

§ 274.3 Definitions

As used in this Part:

(a) "Act" means the Indian Self-Determination and Education Assistance Act (Pub. L.93-638.88 Stat. 2203).

(n) "Previously private school" means a school (other than a Federal school formerly operated by the Bureau), that is operated primarily for Indian students from age 3 years through grade(s) 12; and, which at the time of application is controlled, sanctioned, or chartered by the governing body(s) of an Indian tribe(s).

APPENDIX P

25 CFR PART 31a, EXCERPTS, IMPLEMENTING PUBLIC LAW 95-561, TITLE XI 25 U.S.C. §§2001-2019.

PART 31a——INDIAN EDUCATION POLICIES

§ 31a.1 Purpose and scope.

The purpose of the Part is to state the policies to be followed by all schools and education programs under the jurisdiction of the Bureau of Indian Affairs. Contract schools operated by Indian Tribes or Alaska Native entities may develop their independent policies, consistent with contractual obligations, or adhere to these. The adherence to the appropriate policies shall reflect the best interests of the student, the Federal government, the Tribes and Alaska Native entities, and shall be based on educationally sound judgment.

§ 31a.3 Mission statement

Recognizing the special rights of Indian Tribes and Alaska Native entities and the unique government-to-government relationship of Indian Tribes and Alaska Native villages with the Federal Government as affirmed by the United States Constitution, United States Supreme Court decisions, treaties, Federal statutes, and Executive Order, and as set out in the Congressional declaration in sections 2 and 3 of the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638; 88 Stat. 2203; 25 U.S.C. 450 and 450a), it is the responsibility and goal of the Federal government to provide comprehensive education programs and services for Indians and Alaska Natives. As

acknowledged in section 5 of the Indian Child Welfare Act of 1978 (Pub. L. 95-608; 92 Stat. 3069; 25 U.S.C. 1901), in the Federal Government's protection and preservation of Indian Tribes and Alaska Native villages and their resources, there is no resource more vital to such Tribes and villages than their young people and the Federal Government has a direct interest, as trustee, in protecting Indian and Alaska native children, including their education. The mission of the Bureau of Indian Affairs, Office of Indian Education Programs, is to provide quality education opportunities from early childhood through life in accordance with the Tribes' needs for cultural and economic well-being in keeping with the wide diversity of Indian Tribes and Alaska Native villages as distinct cultural and governmental entities. The Bureau shall manifest consideration of the whole person, taking into account the spiritual, mental, physical and cultural aspects of the person within family and Tribal or Alaska Native village contexts.

§ 31a.4 Policies

(n) *Priorities in contracts and grants.* Provide financial support through contracts, grants or other funding mechanisms with first priority given to the Tribes and Alaska Native entities, Tribal organizations, Tribally controlled community colleges, and Indian or Alaska Native professional or technical assistance organizations which have the sanction of the benefitting Tribes and Alaska Native entities.

(o) *Community school concept.* Promote the community school concept by encouraging year around multi-use of educational facilities, equipment and services for Tribal, Alaska Native village and community development.

(p) *Education close to home.* Provide day and residential educational services as close to an Indian or Alaska Native

student's home as possible, except when a student elects to attend a school elsewhere for specialized curricular offerings or services.

APPENDIX Q

25 C.F.R. PART 252
INDIAN TRADER STATUTES, REGULATIONS FOR NAVAJO, HOPI AND ZUNI RESERVATIONS, (EXCERPT)

§ 252.1 Purpose.

The purpose of the regulations of this Part is to prescribe rules for the regulation of reservation businesses for the protection of Indian consumers on the Navajo, Hopi and Zuni Reservations as required by 25 U.S.C. 261, 262, 263, and 264.

§ 252.2 Scope

The regulations of this part apply to all persons who engage in retail business on the Navajo Reservation,. . .

(f) "Gross receipts" include the following:

(1) All cash received from the conduct and operation of the licensee's business at the premises described in the application for license.

(2) Receipts from both wholesale and retail transactions.

(3) Receipts resulting from transactions concluded off the reservation that originate from the conduct and operation of the licensee's business on the reservation.

(4) The market value of all property taken in trade on the date when received and either held by the licensee for purposes other than resale or credited on any account in payment for merchandise.

(5) Proceeds from the sale of any goods bought from Indians regardless of where the sale takes place.

(6) Finance charge received on loans, but not the return of principal.

§252.3 Definitions.

(i) "Peddler" means a person who offers goods for sale within the exterior boundaries of the Hopi, Navajo or Zuni Reservations, but does not do business from a fixed location or site on any of those reservations.

(l) "Reservation business" means a person that engages at a fixed location or site within the exterior boundaries of the Navajo, Hopi or Zuni Reservations in the sale or purchase of goods or services or in consumer credit transactions with Indians and is not a bank, saving bank, trust company, savings or building and loan association or credit union operating under the laws of the United States or the laws of New Mexico, Arizona or Utah, a business on the Hopi Reservation that is wholly owned and operated by members of the Hopi Tribe, or a business on the Zuni Reservation that is wholly owned and operated by members of the Zuni Tribe.

§ 252.5 Reservation business license required.

(a) No person may own or lease a reservation business without a license issued under the provisions of this subpart.

§ 252.12 Peddlers permits.

(a) Except as provided in paragraph (b) of this section, no peddler may offer goods for sale within the exterior boundaries of the Hopi, Navajo, or Zuni reservations without a peddler's permit. The permit shall state on its face the class of goods that may be offered for sale. No peddler may offer for sale any class of goods other than those listed on the face of the permit.